In the Supreme Court of the United States

OCTOBER TERM, 1976

Supreme Court, U. S.
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No. 76-1292

OCEANIC CALIFORNIA INC.,
Appellant,

vs.

THE NORTH CENTRAL COAST REGIONAL COMMISSION and the CALIFORNIA COASTAL ZONE CONSERVATION COMMISSION,
Appellees.

NATURAL RESOURCES DEFENSE COUNCIL, INC. and CALIFORNIA COASTAL ALLIANCE, INC.,
Intervenors and Appellees.

On Appeal from the Court of Appeal of the State of California, First Appellate District, Division One, After Entry of Order by the Supreme Court of the State of California, Denying a Hearing

Motion to Dismiss or Affirm

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Motion to Dismiss or Affirm

MOTION TO DISMISS OR AFFIRM

The California Coastal Commission, successor in interest under California Public Resources Code Section 30331 to appellees the North Central Coast Regional Commission and the California Coastal Zone Conservation Commission, pursuant to Rule 16 of the revised Rules of the Supreme

Court of the United States, moves the Court to dismiss this appeal or to affirm the decision herein of the Court of Appeal of the State of California, First Appellate District, Division One, which decision became final upon issuance of an order denying hearing by the Supreme Court of the State of California.

The question presented by this appeal or petition for certiorari is entirely insubstantial. Appellant Oceanic asks the Court to rule that constitutionally protected vested property rights may be perfected by reliance upon the most preliminary and general zoning approvals. According to Oceanic, such reliance should be held to protect future development occurring decades into the future from all further exercise of the police power. Such a rule would gradually but inevitably destroy any effective police power regulation which the States or the United States may exercise in the regulation of land use. Endorsement of Oceanic's current theories would mean that if Congress in the future determined that lack of land use control by the states was weakening the nation by wasting scarce resources and that a federal system of land use control was necessary, such a system of federal control could not affect any land where the owner had allegedly relied upon state or local zoning. Such a ruling would also be entirely inconsistent with this Court's traditional recognition of the importance of the States' exercise of the police power in the protection of the public interest.

JURISDICTION

A. Procedural History

Oceanic's procedural history discloses the fact that Oceanic's vested rights theory has now been rejected in *five* forums:

(1) The North Central Coast Regional Commission which made the initial administrative determination;

(2) The California Coastal Zone Conservation Commission which reviewed and affirmed that decision on appeal;

(3) The Superior Court in and for the County of San Francisco which ruled specifically that "the State of California has constitutional power to impose the permit provisions of the Coastal Zone Conservation Act upon all developers who do not meet the vested rights standard in Section 27404 of the Public Resources Code" (Conclusion of Law No. 6, CT 550);[1]

(4) The California Court of Appeal which affirmed the trial court and rendered the opinion which Oceanic appends to its jurisdictional statement; and

(5) The Supreme Court of California which denied Oceanic's petition for hearing.

This unanimous rejection of the claim Oceanic presents in this case is entirely understandable when one considers that Oceanic's own attorneys knew this theory was completely contrary to law. This is illustrated by the following facts which Oceanic omits from its procedural history.

In mid-1973 Oceanic filed claims of exemption for three units of single family dwelling lots (construction of homes not included) and one unit of cluster-development which included construction of buildings. The documentation on these claims of exemption is found at AR 2717-3095. The applications for vested rights exemptions for these subdivisions indicate clearly that Oceanic understood in 1973,

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1. We will utilize the same system of citation to the record which is used in the Jurisdictional Statement. CT refers to the Clerk's Transcript of proceedings in the trial court; AR refers to the administrative record before the Regional Commission; and RT refers to the Reporter's Transcript of proceedings at trial.

after passage of the Coastal Act of 1972, that the law of vested rights did not permit a complete exemption for the wholly undeveloped portions of a large parcel of land being developed in increments, though a plausible argument could be made that certain subdivision increments which were "in progress" on November 8, 1972 were exempt. See Oceanic's applications, AR 2721-2728; AR 2831-2840. In these applications Oceanic stated its belief that approval of a tentative subdivision map was a discretionary act, that conditions could be placed on approval of the tentative map to require further discretionary approvals such as rezoning, and that if the County Zoning Ordinance required precise development plan approval along with subdivision approval (e.g. for condominiums, see Sonoma County Code Section 26-156), then "vested rights would not attach until such action is completed." AR 2833-34.

These statements were made on May 24, 1973. Shortly thereafter the Commission granted exemptions for the particular subdivision increments involved in Oceanic's initial applications for exemption. Then many months later, Oceanic returned to the Commission with a brand new theory of vested rights which, Oceanic contended, required the Commission to grant an exemption for *all* further development work on its incremental project, including work which has not even gotten beyond the preliminary planning stages. Oceanic proposed that the Commission should grant vested rights based on alleged reliance upon little more than a zoning approval, a concept which was and is without precedent in California law. In this proceeding, Oceanic asks this Court to overturn long-standing rules of vested rights which the agencies and the courts of California have properly applied.

B. Jurisdictional Ground for a Hearing in This Court

Appellees do not dispute that this Court has jurisdiction to consider whether the final ruling of the highest State Court of California violates the rights of any person under the Fourteenth Amendment of the United States Constitution. Appellees would note, however, that Oceanic's claim that Section 27404 of the California Coastal Zone Conservation Act of 1972 is unconstitutional is quite similar, and in some respects identical, to the contentions made by Avco Community Developers, Inc. in two cases which have recently been appealed to this Court. In both cases, this Court has dismissed the appeal and denied certiorari. See Case Nos. 76-888 and 76-1102. Rulings reported at 45 Law Week 3569 and 45 Law Week 3664. This case deserves a similar summary dismissal.[2]

QUESTION PRESENTED

Appellant, Oceanic California, Inc., has not fairly stated the question in this case. The question appellant presents in its jurisdictional statement is more properly stated as follows:

Can a developer defeat an otherwise valid exercise of the police power by claiming to have relied on a preliminary approval in concept embodied in a zoning change, which

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2. Oceanic extensively briefed its legal position as *amicus curiae* on behalf of Avco before the California Supreme Court. The Court specifically referred to Oceanic's participation and rejected its theory completely. 17 Cal.3d at 796. The opinion below recognized this in its statement that "the principle predicates upon which the developer's contentions must rest have been advanced and refuted in the recent decision in *Avco Community Developers, Inc. v. South Coast Regional Comm.* (1976 17 Cal.3d 785". (See Jurisdictional Statement, p. A-2).

approval does not of itself authorize any construction, and which gives the developer notice that further more specific approvals are required, or may the government insist that constitutionally protected vested rights depend on reliance upon an actual authorization to proceed with and complete particular development shown on precisely drawn approved plans?

STATEMENT OF THE CASE

A. Development History of the Sea Ranch

The development history of Oceanic's "Sea Ranch" development discloses two general types of governmental action relating to governmental review and approval of Oceanic's development plans. One type of action involves general approvals in concept typified by the adoption of zoning districts and a general and specific plan for the Sea Ranch area. Two common characteristics of these governmental actions are that (1) they do not specifically authorize any construction to occur but instead contemplate that further specific authorizations will have to be obtained, and (2) they are, under California State Law, subject to change at any time that the governing body determines that such change is in the public interest. *See* California Government Code Section 65356.1 (amendment of general plan); Government Code Section 65507 (amendment of specific plan); Government Code Section 65853 (amendment of zoning ordinance). In other words, a developer who obtains favorable action on a zoning request is on notice that further authorization is required before he may assume the zoning is in any way fixed. A second type of governmental action involves the approval of subdivision maps, grading permits, building permits, and the like. Unlike the first category, these actions authorize specific construction or other development to occur and they are based on precisely drawn development plans which define exactly what the developer intends to do.

While the trial court did recognize that the first type of action had occurred with respect to all of Oceanic's Del Mar Ranch property[3] (trial court findings 5, 7, 14, and 18-20, CT 533-391), the trial court also found that with respect to all of the land for which Oceanic claims vested rights in this proceeding, Oceanic lacked some or all of the followings: tentative subdivision map approval, final subdivision map approval, use permit approvals, precise development plan approvals, grading permit approvals, septic tank or sewer connection approvals, and building permits. See trial court findings 24, 25, 26, and 32; CT 540-43. Since Oceanic could not claim to have relied upon the second category of governmental action for the lands involved in its claim of exemption in this case, Oceanic's argument has consistently focused upon the first type of governmental action, contending that in this case the zoning approvals and the adoption of the general and specific plan should be considered an adequate basis for a constitutional prohibition against any further governmental regulation.

1. THE PLANNED COMMUNITY ZONING APPROVALS

The first zoning approval for the Sea Ranch occurred in June of 1964 when the County adopted a planned community district for the southerly 1,800 acres of the Del Mar Ranch. In the jurisdictional statement, Oceanic does its best to make it sound as though this approval was based upon a

3. Oceanic purchased a 5,200 acre tract of land in Sonoma County known as the Del Mar Ranch. Portions of this land have been made part of a residential community which Oceanic has named the Sea Ranch.

very specific plan for construction of a precise development by stating that various studies

> "were presented as part of Oceanic's zoning application and became a part of the approvals subsequently granted, for the express purpose of requiring control of all human activities on the Sea Ranch by precise constraints, applicable to the entire property, to achieve the goals of a precise plan of use and environmental protection." Jurisdictional Statement, page 9.

This statement contends, by way of suggestion, that the provision of criteria whereby any number of precise plans might be evaluated is the equivalent of the provision of one precise plan for review by a governmental body.[4] Close examination of the 1964 planned community development plan demonstrates this point.

The 1964 PC Plan (referred to in the trial court's finding 5 as the "1964 PC Map" and found at AR 919) shows that as of the time the PC zoning was adopted, only generalized areas had been designated for various types of residential and commercial development. Not a single building is precisely sited nor is it even possible to determine how many lots will be created in any given area or overall. Although it is difficult to read the reduced reproduction of 1964 PC Map which is contained in the administrative record, the original map, filed with the trial court as an exhibit, shows that in no less than 10 places on the map a disclaimer is made that all buildings shown on the map are schematic only and are not intended to reflect true density of develop-

4. This is significant because it shows that Oceanic's argument, stripped of rhetoric, amounts to little more than the contention that developers should be permitted to perfect vested rights by relying upon zoning ordinances.

ment.[5] Thus, it was recognized from the very beginning that although the County approved a zoning application for nearly ⅓ of the land owned by Oceanic in 1964, further governmental approvals in the nature of precise development authorizations would be required as Oceanic worked out the specifics of its intended development. (See AR 923-24; RT 145-46, 173).

In early 1968, Oceanic obtained from the County planned community zoning for the remaining 3,400 acres of the Del Mar Ranch. (Finding 14, CT 537). Examination of the 1968 PC Map (found at AR 914) indicates once again a very generalized plan which does not show specific siting of lots, homes, or condominiums.

The County Planning Department's staff report on the 1968 Plan, while recommending favorable action, makes it very clear that this approval is by no means a final

5. The imprecision of both the 1964 and 1968 PC Plan Maps not only serves to indicate that further authorizations were required, but in the case of the Sea Ranch actually constitutes a showing that the PC Zoning obtained by Oceanic was void. Respondents made a showing to the trial court that Oceanic had not complied with the PC Zoning ordinance which existed in 1964 and 1968, that according to the ordinance the approval of such zoning was therefore void, and that there was no explanation of why the ordinance was violated nor any showing of an attempt to obtain a variance. Under *Pettitt v. City of Fresno* (1973) 34 Cal.App.3d 813, 819 and a number of other California cases cited in the briefs below, vested rights cannot be perfected based upon invalid approvals. However, the trial court refused to grant respondents' findings on the issue of the validity of Oceanic's PC Zoning, and on appeal the Court of Appeal determined that it was not necessary to consider our cross-appeal on that matter (See Respondents' responding brief on appeal and opening brief on cross-appeal, pages 181-192) because even assuming that the zoning was valid, Oceanic had not obtained vested right. The question of the validity of the zoning remains unresolved. We mention it at this point only because we believe that even if this Court were sympathetic to some of Oceanic's contentions, the facts of this case render it inappropriate as a foundation for a new federal rule of vested rights.

authorization of all development which is to occur on the Del Mar Ranch. The staff states:

> "Since there is only a schematic development plan, we readily recognize that the areas designated are generalized and as more precise studies are developed by the Sea Ranch planning staff the boundaries will be adjusted accordingly by subsequent amended use permits and planning commission action on tentative subdivision maps." (AR 943).

A similar oral statement to the Sonoma County Board of Supervisors is documented in the minutes of the meeting of April 9, 1968 (AR 966).

Further examination of the way in which these zoning approvals were implemented historically indicates that the development of the Sea Ranch has always proceeded on an incremental basis. See trial court finding No. 8, CT 535-36. For each numbered subdivision unit mentioned in the first sentence of finding No. 28 by the trial court, (CT 542) Oceanic filed a separate tentative subdivision map which required approval by the County of Sonoma. (See AR Volume IV for the various resolutions of the Planning Commission and Board of Supervisors with respect to each subdivision). Oceanic would then execute, for each separate subdivision unit, an improvement agreement and provide a performance bond to insure that all of the work on roads and utilities or other development contemplated in the tentative map approval would in fact be performed. (See AR, 1379-1809). After execution of these agreements, and in some cases after the grant of the scenic easement over all common areas in a particular Sea Ranch increment, the County would approve a final subdivision map which would thereafter be recorded with the County Recorder. At the time of such recording, the increment would be

made subject to the Sea Ranch restrictions by formal annexation in accordance with those restrictions. (See Article II of the Sea Ranch restrictions, AR 853-54). Finally, after recordation of a final subdivision map, for each individual unit of the Sea Ranch a subdivision public report would be issued by the California Department of Real Estate. (See AR 2265-2483). A detailed chronology of the history of each unit of the Sea Ranch, whether completed or only partially approved as of November 8, 1972, is provided in the appendix to the staff report before the Regional Coastal Commission. (AR 121-148).

2. GENERAL AND SPECIFIC PLAN APPROVAL

When general and specific plans were adopted for the Sea Ranch area in August, 1972, the incremental nature of the development procedure was emphasized. The specific plan, for example, does not contain specific planning for all of the acreage which Oceanic may ultimately make a part of the Sea Ranch through the annexation process described above. (Finding 20, CT 539). Precise lot design is shown for all of those areas for which tentative subdivision maps had been approved by mid-1972, but nearly ⅓ of the acreage of Oceanic's original holding (Del Mar Ranch), is simply left for future detailed planning. (Finding 20, CT 539; AR 1062). This unplanned portion of the 1972 specific plan reflects that precise planning of development on the Del Mar Ranch has *not* occurred at the zoning stage, but only as incremental units have been brought to the County for specific authorization. The specific plan itself states:

> "The lands subject to this specific plan fall into two categories—those which have been developed or are scheduled for development in the near future, and

those as to which detailed planning *has not advanced beyond the level of the existing planned community zoning.*" (Emphasis added) AR 1052.

Evidence at the trial indicated that the unplanned area was left without specific details partly because the County wished to maintain the possibility of access from Highway 1 through the Sea Ranch to adjoining lands and partly because the owners of such adjoining lands wanted to assure that if growth control were imposed in the future, "that the Sea Ranch would not get the lion's share of the growth", simply based upon approval of this specific plan. (RT 47). In other words, the records shows that the County intended to maintain its option of reducing the density on the undeveloped portion of the Del Mar Ranch if future conditions indicated a need to do so prior to the establishment of actual use by Oceanic.

3. THE SEA RANCH RESTRICTIONS

In concluding this discussion of the various overall review actions taken by the County with respect to Oceanic's land holdings (the Del Mar Ranch) it is appropriate to comment on the uniform system of covenants, conditions and restrictions (the "Sea Ranch restrictions") which have been applied to each increment of development. These restrictions have been important in this proceeding since Oceanic has consistently contended that the County relinquished all discretion for approval of homes on Sea Ranch lots by requiring that each subdivision increment be made subject to the Sea Ranch restrictions. In other words, Oceanic's theory of vested rights contends that once the County required the Sea Ranch restrictions as part of subdivision map approval, it necessarily (by constitutional mandate) relinquished all police power review of the use of the lots created.

Oceanic's theory is based on the fact that the Sea Ranch restrictions place certain design controls on the purchasers of Sea Ranch lots, and Oceanic contends that the approval of these controls is essentially equivalent to approval of a precise architectural plan for a building. (See Jurisdictional Statement pages 9-10). However, there is a great deal that Oceanic does not disclose to this Court about the restrictions. First, the design controls referred to above *do not apply to lots owned by Oceanic.* (See definition of "owner" in the Sea Ranch restrictions which exempts Oceanic from the necessity of complying with the design controls, AR 851). The trial court found that this litigation affects only the land owned by Oceanic (conclusion of law 14, CT 551-551A), and since on that land the design restrictions do not apply, the design restrictions are irrelevant in this case. A second factor which Oceanic does not disclose about the restrictions is that most of the design controls imposed by the restrictions are effected exclusively through the requirement of obtaining design approval from the Sea Ranch design review committee. The restrictions do *not* provide any specific plans for construction on any lot. (Finding No. 12, CT 536-37). Precise construction plans for buildings are not formulated until shortly before construction and are submitted to the design review committee only when they have been completed by the lot owners' architect. See Section 3.03(e) of the Sea Ranch Restrictions, AR 857-58. The design committee exercises complete discretion over approval of the siting or design of any proposed single family dwelling at the Sea Ranch except for dwellings which may be built on lots owned by Oceanic itself. (Finding 12, CT 536-37; Sea Ranch Restrictions, Section 3.03(e), AR 858 and AR 851; testimony of Al Boeke, AR 377-81). Moreover, although

the County historically agreed with the design committee in its decisions by issuing permits only to those persons who obtained design committee approval, the County did *not* expressly delegate any authority to the Sea Ranch design committee. (Finding 13, CT 537). Hence, the County retains the ability to control design and construction of homes on Sea Ranch lots. (See testimony of Supervisor Vella on this point, RT 86-89).

This review of the development history of the Sea Ranch indicates that this case does not involve a "precise, specific and complete approval of the Sea Ranch" as Oceanic has represented to the Court. Jurisdictional Statement, page 27. Furthermore, careful examination of the various actions of the County of Sonoma shows that many of the statements made in the Jurisdictional Statement are misleading. When Oceanic states that the 1964 zoning approval included controls "locating each lot by reference to environmental constraints" (Jurisdictional Statement, page 9) this really means that the County adopted criteria to guide location of lots in the future. No lots were actually located on the 1964 plan. Similarly, when Oceanic states that the 1964 zoning approval included controls "restricting the buildable area on each lot by scenic easements, view corridors and other restraints" (Jurisdictional Statement, page 9) what is really meant is that the Sea Ranch restrictions provided for the *possibility* that such restraints might be imposed in the future. In fact, examination of all of the subdivision maps recorded to date (contained in administrative record, Volume VI) shows that the vast majority of lots which Oceanic has created contain no such restrictions other than a standard 10 or 20 foot set back line. Finally, when Oceanic states that the zoning approved by the County contained controls "controlling size, weight, bulk, exterior

appearance (down to the color and composition) of all structures" (Jurisdictional Statement, page 9) what is really meant is that a design review committee was created to review these matters as the need should arise in the future, and that no control whatsoever exists for buildings constructed on lots owned by Oceanic. Viewing the record realistically, neither the Commissions nor the Courts of California agreed with Oceanic that this development history provides a basis for concluding that the State has relinquished its right to exercise the police power by allowing the developer in this case to rely upon a final authorization of the entire Sea Ranch project.

4. DEDICATION OF LAND FOR THE GUALALA POINT PARK

One final area in which the Jurisdictional Statement is misleading involves the dedication of some land for the Gualala Point Park which occurred in June of 1969. Oceanic states (Jurisdictional Statement, page 12) that the "*instrument of conveyance* recites that the park was dedicated to provide public recreational use of the coast pursuant to an overall land use plan for the Sea Ranch as a unitary development". (Emphasis Added). While such a statement did appear in a resolution declaring policy of the County Board of Supervisors (dated June 30, 1969 and found at AR 2245), this resolution was *not* an "instrument of conveyance" and in fact the policy resolution was passed three weeks *after* the actual acceptance of the dedication occurred. Oceanic did not submit to the Coastal Commission any document which could be fairly viewed as an instrument of conveyance, though the record does reflect a description of the offer of conveyance in the minutes of a meeting of the Board of Supervisors (AR 2250) and the acceptance of this offer is documented by a resolution dated June 9, 1969 (AR

2243). The offer to dedicate was apparently conditioned only upon the County agreeing to develop the acreage as a regional park (which was obviously to Oceanic's benefit in making its lots more attractive to prospective purchasers) and the acceptance was conditioned only upon the provision of adequate title insurance. In other words, there is no indication that Oceanic requested or that the County agreed to a condition that this dedication be contingent upon continued exercise of the police power in any particular manner in the future. Under these circumstances, there is nothing inequitable about the continued exercise of the police power through application of the Coastal Act to Oceanic's development after a dedication of open space acreage has been accepted at face value and all conditions expressed in the dedication have been satisfied.

B. The California Coastal Zone Conservation Act of 1972

On November 7, 1972 the voters of the State of California enacted the California Coastal Zone Conservation Act of 1972 by initiative in order to protect Statewide interests in the orderly planning and development of the Coastal Zone. The Coastal Commissions created by the 1972 Act did not assert permit jurisdiction over development which had already occurred at the Sea Ranch nor did the Commission refuse to exempt areas of the Sea Ranch where Oceanic contended development had commenced prior to the enactment of the Coastal Act. The Commission did insist that the Act's provisions applied prospectively to future development of further increments at the Sea Ranch. It is this position that Oceanic challenges in this case and refers to as "retroactive regulation" (Jurisdictional Statement, page 2).

The California Coastal Commissions recognize that exercises of the police power, whether under the Coastal

Act of 1972 or the succeeding Coastal Act of 1976, are subject to the requirement of reasonableness and that actions taken pursuant to jurisdiction over future development by Oceanic will be judged by that standard. But the Court should note that this question is not in issue at this time. Oceanic did not seek permits for any significant development during the pendency of the 1972 Coastal Act but instead apparently *assumed* that such permits would be denied.[6] It was, of course, Oceanic's privilege to halt development of the project while it litigated the question of the Commission's jurisdiction, but it is not true, as a legal matter, that pending these proceedings "development has necessarily stopped". (Jurisdictional Statement, page 15, Note 11). Oceanic now attempts to cover its own failure to apply for a development permit by contending that public statements made by various individual commissioners show that the Commission had publicly indicated an "intent to prevent any further development of the Sea Ranch". (Jurisdictional Statement, pages 7-8). Reference to the statements themselves (cited in Jurisdictional Statement, page 8, note 7) shows that they fall far short of Oceanic's description, but even if Oceanic's description were accurate, this would not be a proper issue to be raised in this proceeding because the sole purpose of this proceeding is to determine whether commission jurisdiction exists and not whether jurisdiction is properly being exercised. The question at issue in this proceeding, whether jurisdiction exists, is limited to a determination whether vested rights may constitutionally be limited to those cases where developers have relied upon actual authorization rather than acting in anticipation that such authorizations may be forthcoming in the future.

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6. One or two permits for minor amounts of development were granted by the Commission. No permits applied for by Oceanic were ever denied.

ARGUMENT

I. It Is Constitutional for the State of California to Require Reliance Upon a Building Permit or a Substantially Equivalent Authorization to Proceed with and Complete Particular Construction or Other Development Before a Vested Right Is Recognized

As Oceanic points out (Jurisdictional Statement, pages 19-20) traditional vested rights cases in California have stated that the vested rights doctrine is based at least in part upon the doctrine of equitable estoppel, and that the traditional cases have not recognized an estoppel until a building permit has been issued and a developer has substantially relied upon such permit. *Anderson v. City of Pleasant Hill* (1964) 229 Cal.App.2d 79, 89. *See also Spindler Realty Corporation v. Monning* (1966) 243 Cal.App.2d 255. One of Oceanic's major contentions in the argument section of its Jurisdictional Statement is that the California courts have irrationally fixed upon the building permit as the standard in every case and have disregarded the principle of equitable estoppel. For a number of reasons this contention provides no basis for further review of this matter by the Supreme Court.

First, while the doctrine of vested rights may be closely related to the doctrine of equitable estoppel, it is obvious from an examination of cases involving these two doctrines that they are not identical. In the case of *Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720, 725 the California Supreme Court outlined the doctrine of equitable estoppel as follows:

> "The elements of the doctrine are that (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and

> (4) he must rely upon the conduct to his injury. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488-489 [91 Cal. Reptr. 23, 476 P.2d 423].)"

Under this framework, an equitable estoppel depends not only upon reliance upon a statement or conduct of the party to be estopped, but reliance *to the detriment or injury* of the party seeking the estoppel.[7] The doctrine of vested rights, as set forth in the cases, does not expressly require a showing of detriment, but is satisfied if simple reliance upon a clear authorization to proceed is shown. See e.g. *Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785, 791.[8] The four elements listed above also indicate that in order for an estoppel to occur the knowledge of the parties must be unequal concerning the basic facts involved. In the development approval context, at the time of the approval (the conduct on which the estoppel must be based) both parties are normally equally knowledgeable about the facts involved concerning the development, or if anything the developer is normally more knowledgeable. This equal knowledge would normally

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7. In this case Oceanic made no attempt to prove that it has been injured by reliance upon the planned community zoning approvals. Oceanic cited only that it had spent some $26,000,000.00 developing the Sea Ranch. No evidence was presented as to the amount which Oceanic had received from sale of lots and other income sources related to the Sea Ranch and the trial court was therefore unable to determine whether Oceanic had made a profit or a loss on the project as of November 8, 1972. See trial court finding no. 35(b) CT 545-46. Since Oceanic has shown no injury resulting from its reliance, it has not demonstrated that an equitable estoppel should occur in this case.

8. The vested rights test *could* require a showing of actual harm before a non-conforming use is recognized, but California courts have not taken this approach, possibly because of the difficulty of determining when losses are due to the new regulation and when they are simply due to bad management or market conditions not associated with the new regulation. This difficulty is avoided by simply granting a vested right to *all* who qualify, regardless of profit or loss, under a test which all parties have notice of when they contemplate the decision to begin a project.

militate against an estoppel, yet the doctrine of vested rights requires the government to stand by its final authorization if that authorization is valid and has been substantially relied upon. Thus, the doctrine of vested rights, while related to the doctrine of equitable estoppel, is more a product of the due process clause of constitution and the basic requirement of fairness than an application of the doctrine of equitable estoppel.

The importance of this analysis is that it explains why the courts of California have drawn a clear line constituting a legal test for vested rights rather than leaving the vested rights test subject to a case-by-case factual determination as is generally the procedure in determining whether an equitable estoppel has occurred. The concept of fundamental fairness embodied in the due process clause of the constitution is satisfied by the fact that the law has been clear for many many years that vested rights can be obtained when, and only when, a developer relies upon a final authorization to proceed. *Dobbins v. City of Los Angeles* (1904) 195 U.S. 223; *Avco Community Developers, Inc. v. South Coastal Regional Commission* 17 Cal.3d 285; *Anderson v. City Counsel* (1964) 229 Cal.App.2d 79. Developers have also been on notice for many years that "a land owner has no vested right in existing or anticipated zoning". *Avco Community Developers, Inc. v. South Coast Regional Commission, supra* at 796; *HFH Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 516; *Morse v. County of San Luis Obispo* (1967) 247 Cal.App.2d 600, 602. Since developers, and particularly sophisticated developers such as Oceanic,[9] are capable of anticipating when their rights will

9. The trial court specifically found:
"During the development of the Sea Ranch, Oceanic has been represented by legal counsel and has been capable of determining the legal requirements which may affect the development of the Sea Ranch." Finding No. 15, CT 537.

vest and are therefore capable of determining whether they wish to take the necessary business risks involved in any development, it is not unfair to impose upon them those normal risks of development. In this case, the knowledge of the developer of the need to obtain further authorization must be assumed not only from the general presumption that developers as well as other persons are presumed to know the law, but also because the zoning approvals and the general and specific planned approvals clearly authorize no development or construction but require further authorization to be obtained before construction may proceed.

Oceanic complains that the issuance of a building permit is normally a ministerial function and that vested rights should not be measured from a point so unimportant as the issuance of "a certificate of probable noncollapse" (Jurisdictional Statement, page 25). However, as we have noted above, the amount of discretion exercised by government at the point where vested rights occur is not as important in determining the fairness of the rule as is the clarity of the rule itself so that adequate notice is given. Where developers *know* that they must obtain a building permit (as they have known in California for decades) then the rule is fair and constitutional regardless of whether one considers it the wisest or most logical rule.

Of equal importance, Oceanic is incorrect in characterizing the issuance of a building permit as necessarily a ministerial act. While it is true that some building codes have been interpreted in such a way that the issuance of a building permit is considered ministerial, there are other situations in which the issuance of a building permit has been interpreted to involve the exercise of considerable discretion. *See e.g. Slagle Construction Co. v. County of Contra Costa* (1977) 67 Cal.App.3d 559. Moreover, the

fact that a building code may presently be structured in such a way that the issuance of a building permit is ministerial does not preclude the possibility that future ordinances may amend that code to require the exercise of discretion by planning commissions and building departments. To adopt Oceanic's theory would mean that once a subdivision map is filed, any such changes in the building code can have no effect on buildings constructed on the lots created by the subdivision even if such construction does not take place for decades into the future. The law does not favor the creation and continuation of non-conforming uses (*See County of San Diego v. McClurken* (1951) 37 Cal.2d 683, 686-87 and cases cited therein) and the Constitution certainly does not require complete suspension of the police power upon the filing of a subdivision map. *Hill v. City of Manhatten Beach* (1971) 6 Cal.3d 279, 285-86.

Oceanic's arguments concerning the requirement of the building permit should also be rejected because they mischaracterize the actual holdings of the California Courts. The California Supreme Court in *Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785, 793-94 referred with approval to the fact that the Commissions do not deem "a building permit to be an absolute requirement under all circumstances for acquisition of a vested right". [The Commission] suggests that in rare situations the government may grant another type of permit, such as a conditional use permit, which affords substantially the same specificity and definition to a project as a building permit, and that in such instances a builder might acquire a vested right even though the document was not designated a 'building permit.'" The Court of

Appeal in this case makes reference to this passage and states:

> "It may be assumed that literal adherence to the issuance of a 'building permit' is not the *sine qua non* of the establishment of a vested right to complete one of the forms of development contemplated by the [Coastal] Act." Jurisdictional Statement, page 8-9; 63 Cal.App.3d at 67.

In other words, the California Courts have agreed with the Coastal Commission that the vested rights test is described with complete accuracy as substantial reliance upon a final authorization to proceed with and complete precisely defined development. A building permit provides the specificity of plans, and the clear authorization to proceed which is necessary to obtain a vested right. The building permit also normally contains a time limitation which avoids the accumulation of nonestablished, nonconforming uses. Other permits and authorizations which have the same attributes will probably be recognized in the future for the establishment of vested rights as they have been in the past. E.g. *Spindler Realty Corporation v. Monning* (1966) 243 Cal.App.2d 255 (vested rights based upon a grading permit); *Trans-Oceanic Oil Co. v. Santa Barbara* (1948) 85 Cal.App.2d 776 (vested rights based upon issuance of a drilling permit). The issuance of general zoning approvals which do not contain these important characteristics, however, have not been recognized in the past as a basis for vested rights and do not constitute an appropriate basis for recognition of vested rights in the future.

II. Nothing in Modern Land Use Control Procedures Requires a Change in Traditional Vested Rights Law, but if Such Change Is Deemed Desirable, It Should Be Accomplished by Legislation and Not by Constitutional Mandate

Oceanic argues that because land use controls have changed in recent years in that specific projects are subjected to greater scrutiny on a case-by-case basis, it is time for the Court to reexamine and reformulate the constitutional concept of vested rights. (Jurisdictional Statement, page 17). However, Oceanic would have the Court focus only upon the increased impact upon the individual developer of modern development control and ignore the basic reason why such controls are becoming more stringent. We live in a time of increasing population and diminishing resources. Our nation is becoming increasingly aware that as all types of resources, including land, become more scarce, there is an increasing public interest in how such resources are used and there is an ever increasing need for new and innovative laws in exercise of the police power to protect the public interest. Thus, if anything, this Court's statements in *Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 71 L.Ed. 303, 47 S.C. 114 that the extent of the police power must depend upon contemporary conditions means that in modern circumstances far more stringent police power regulations are possible than those which were possible when the *Euclid* case was decided. As our resources become scarcer in the future, an even greater need for innovative controls can be anticipated. Thus, Oceanic's one sided view of "contemporary conditions" is out of touch with reality in suggesting to the Court that a new constitutional rule of vested rights, placing massive restrictions upon the exercise of the police power, is appropriate at this time.

Oceanic's request for a change in the law of vested rights resolves into two main arguments. First, Oceanic contends that modern land use practices, by achieving public objectives in better planning and dedications of necessary open space and public facilities, should be encouraged and that a change in the law of vested rights is necessary to provide such encouragement. Oceanic suggests that developers will not make necessary dedications and comply with other public interest oriented conditions of development unless they are assured that reliance upon planned unit development zoning will prevent government from exercising the police power even as to severable portions of a project which have not been commenced. A careful sociological and economic study of development practices today might confirm or more probably would refute Oceanic's contention in this regard,[10] but whether Oceanic is correct or not, it is obvious that the extent of protection afforded to developers should be de-

10. Land use authorities are by no means unanimous in their praise of planned unit developments. Serious criticism of this concept is found, for example, in 2 N. Williams, Jr., *American Planning Law: Land Use And The Police Power*, §§ 48.01-48.12 (1974); R. Burchell & J. Hughes, *Planned Unit Development: New Communities American Style* (1972); Mandelker, *Reflections on the American System of Planning Controls: A Response to Professor Krasnowiecki*, 114 U. Pa. L. Rev. 98 (1965). Among the many objections to the planned unit development concept, Norman Williams makes the following observation:

> "The final objection to the PUD approach is simply that the basic principle is wrong. Along with the obvious possibilities for favoritism and/or corruption, the establishment of such a system is just a step away from government by rule of law, and back to the system of government by deal. From this viewpoint, planned unit development regulations are not a new idea; they are an invitation to regress, under rather stylish auspices, to the worst abuses of the past." 2 *Williams, supra*, § 48.04 at 231.

This is the concept which Oceanic contends should have a special constitutionally protected status.

cided as a legislative matter. The Commissions respectfully contend that the due process clause does not require this Court to second guess legislative judgment in this area by codifying Oceanic's views of sound planning policy in constitutional concrete.

A more significant argument which Oceanic makes in support of a change in the traditional rule of vested rights involves purported fairness to developers. Oceanic paints a picture of government conniving to take advantage of developers by demanding and accepting dedications and other benefits in exchange for development approval while harboring the secret intention of repudiating those approvals at a future time. This picture is not only a distorted view of the general relationship between government and land owners, but as we have pointed out above, it has nothing to do with the facts of this dispute. Oceanic knew at all stages of development of the Sea Ranch that further development depended upon receipt of further approvals from the County. This knowledge is vividly demonstrated by Oceanic's own statement to the Coastal Commission in 1973 concerning the law of vested rights. Therefore, in undertaking certain expenditures for utilities and planning with respect to all of its land, Oceanic took a calculated risk which is simply part of the land development business.

Responding more directly to Oceanic's general assertions concerning the unfairness of the vested rights rule as applied to modern land development procedures, the Commission would point out that the present law of vested rights does not prevent developers from protecting themselves against the possible necessity for a future exercise of the police power which may modify their project and effect their profit. For example, a developer who grants a

significant dedication in exchange for development approval may either insure that the dedication does not occur until the final authorizations are received, or alternatively may condition the dedication upon completion of a certain amount of development. Oceanic did not do this. A developer of a large project can either phase construction of utilities to minimize the risk of later modification of the project, or he may knowingly accept the risk of a future modification if he perceives a potentially larger profit from constructing such facilities all at once. Oceanic would have this Court rule that the Constitution requires government to provide assurance that many years of projected development will continue to be permitted regardless of changes in social, economic, and environmental conditions, and thereby insure a developer's profits once he obtains the most preliminary approval of a massive development project.

In addition to rejecting Oceanic's contention that the Constitution requires such a result, the Commissions contend that such a result is undesirable from a public policy point of view. The current risk which the developer must run of a future exercise of the police power has the salutory effect of forcing the developer to consider the public interest at all stages of the planning and execution of his development since his profits depend upon continued acceptance of the development by the community. Elimination of that risk, either legislatively or by constitutional interpretation, would have the effect of encouraging the developer to push through undesirable projects by any available means regardless of public interest considerations since even preliminary approval would insure against the losses from the need for further regulation. Under current vested rights law, the developer who anticipates and provides for accom-

modation of the public interest is far less likely to suffer a loss due to later exercise of the police power than a developer who ignores considerable public interest considerations in planning his development.[11] In short, developers are not incapable of protecting themselves from either unreasonable exercises of the police power or unexpected necessary exercises of that power. Thus, Oceanic's arguments in favor of a change of the law of vested rights are both insubstantial on their face and inapplicable to the current controversy.

CONCLUSION

For all of the foregoing reasons, there is no need for this Court to treat this case any differently from the cases of *Avco Community Developers, Inc. v. South Coast Regional Comm.*, Case No. 76-888 (Appeal dismissed for lack of jurisdiction; cert. denied, 45 LW 3569) and *Avco Community Developers, Inc. v. South Coast Regional Comm.* Case No. 76-1102 (Appeal dismissed; cert. denied, 45 LW 3664). The California Courts have properly applied a constitutional rule of long-standing which is fair and reasonable and which should not be disturbed.

Respectfully submitted,

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11. For example, Oceanic planned the Sea Ranch in such a way that it would restrict access to over ten miles of California's publicly owned tidelands so that only the owners of Sea Ranch lots could use those tidelands. In a companion case involving Commission action granting permits for home construction on Sea Ranch lots, the California Court of Appeal has noted that this development plan is against the public policy of the State of California. *Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Commission* (1976) 57 Cal.App.3d 76, 84. It is also a violation of California Constitution Article X, Section 4 (formerly Art. XV, Sec. 2) which provides:

> "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."